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THE LAW AS A TRADE

*Wallace Rudolph**

I have a deep and abiding loyalty to the legal profession. I recognize that lawyers have a duty beyond most trades to give at times more service than is justified by the pay. I further recognize that lawyers have often given more than a fair exchange for money when they have served unpopular clients, indigent clients and the like. On the other hand, the fact that law is a learned as well as a service profession does not eliminate self interest among lawyers. Like tradesmen, lawyers may place their economic well being above that of the public. Referring to this nearly universal human trait Adam Smith once wrote:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.¹

Can lawyers be an exception to this rule? The answer of the Committee on Economics of Law Practice is that:

Minimum fee schedules serve as one means of insuring quality legal service for a fair and adequate charge. The client is entitled to a better product than the inferior legal service that is frequently rendered by the lawyer who solicits business by "fee cutting."

. . . .

For the lawyer, minimum fee schedules base competition within the profession on skill and the quality of service rather than on the price charged. This tends to minimize inadequate service and discourage unethical practices. Furthermore, minimum fee schedules promote efficiency within the profession by encouraging all lawyers to critically evaluate their operations and revise or dispose of obsolete and inefficient procedures.²

For example, in 1897 the Trans-Missouri Freight Association entered into an agreement to establish rates. The association claimed that its rates were reasonable. The trial court dismissed the government's complaint holding that agreements are not unlawful that "go to the extent only of preventing unhealthy competition, and yet at the same time furnish the public with adequate facilities at . . . reasonable prices. . . ."³ The United States Supreme Court, however, reversed the trial court. Justice Peckham said:

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¹ A. SMITH, *THE WEALTH OF NATIONS* 128 (Modern Library ed. 1937).

² COMMITTEE ON ECONOMICS OF LAW PRACTICE, *AMERICAN BAR ASSOCIATION, REPORT ON MINIMUM FEE SCHEDULES* 4, 5 (1971).

³ *United States v. Trans-Missouri Freight Ass'n*, 53 F. 440, 451 (C.C.D. Kan. 1892), *rev'd*, 166 U.S. 290 (1897).

The Claim that the Company . . . has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep the rates to that point. If there be any competition the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.⁴

This same position was taken in *United States v. Addyston Pipe & Steel Co.* where Justice Taft said:

Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had encountered, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade.⁵

These two decisions have never been questioned. Price fixing, whether the prices have been reasonable or not, has been illegal *per se*. Hence, in a series of cases involving trade associations the Court has held that the distribution of average cost figures to the members of the association only and the required reporting of actual prices along with admonitions concerning stabilization of prices can be violations of the anti-trust laws.⁶ The rationale of these decisions is simply that trade associations may not be used as an enforcing mechanism for illegal agreements to fix prices and that any activities of the associations that might lead to their use as an enforcement mechanism may be banned.⁷

This is not to say that the law has never approved of price fixing. Indeed what was done illegally by private parties in the *Trans-Missouri Case* is now done legally both by the I.C.C. in regulating railroads and the C.A.B. in regulating airplanes.⁸ Even

⁴ 166 U.S. 290 (1897).

⁵ 85 F. 271, 291 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

⁶ *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

⁷ *FTC v. Cement Institute*, 333 U.S. 683 (1948).

⁸ *United States v. Chicago M., St. P. & P. Ry.*, 294 U.S. 499, 506 (1935), where Justice Cardozo declared: "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust to charges for itself. *Texas & Pacific R. Co. v. United States*, 289 U.S. 627, 636, 53 S. Ct. 768, 77 L. Ed. 1410; *United States v. Illinois Central R. Co.*, 263 U.S. 515, 522, 44 S. Ct. 189, 192, 68 L. Ed.

local railway and utility commissions allow price fixing by local utilities.⁹ Moreover, during the great depression price competition was avoided through the N.R.A. and through the general adoption of fair trade laws.

Later, of course, the N.R.A. was declared unconstitutional as an improper delegation to private associations of the governmental power to fix prices,¹⁰ and the fair trade laws have been repeatedly under attack both constitutionally and economically as infringement on competition and the right to contract.¹¹

One might well ask why the law is solicitous of the free market. Why should the law be concerned if competitors fix prices or limit entry into a field? Or, to be sure, why did Adam Smith conclude that members of the same trade wish to conspire against the public.¹²

The answer is that the price for an article or service may vary between two points. On the up side the price can be as high as the full economic value to the buyer. For example, suppose that someone has a good claim of \$1,000 against another person but that he needs a lawyer to collect it. He certainly is not willing to pay the lawyer more than the \$1,000. Hence the theoretical absolute limit would be \$999.99. Lawyers are well aware that their charges cannot exceed the value of their services to the client. In fact, the scaling down of fees relates to this phenomenon.

In economic terms the cost of a legal service is simply the value of alternative employment for the lawyer. In the long run, therefore, the cost of legal services is the income the lawyer could have made in a comparable profession. In the short run, the cost of a particular legal service is the value of other legal work he could have done. The spectre facing anyone in any field is the possibility of temporary excess capacity: in the case of the lawyer the spectre is excess time. In such a situation a particular lawyer may have

417. We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. Interstate Commerce Act, § 15a. Those tendencies excluded, 'a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise.' *United States v. Illinois Central R. Co.*"

⁹ NEB. REV. STAT. § 75-119 (Supp. 1969).

¹⁰ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), declaring the National Industrial Recovery Act of 1933 unconstitutional.

¹¹ H. BLAKE & R. PITOFKY, *CASES AND MATERIALS ON ANTITRUST LAW* 526 (1971). (Note on State Fair Trade Laws and Other Forms of State Action to Maintain Resale Prices).

¹² See note 1 *supra*, and accompanying text.

no present alternate employment and therefore the cost of his services may be zero. Under such circumstances he may do legal work at a price that simply covers his office overhead and keeps him alive. This is especially true when alternate employment is scarce.

Returning to the long run for a moment, we can see that the price of legal services cannot fall very much below the value of alternate employment such as that of accountants, auditors, dentists, business managers, etc. If it did so fall, entry into the law would slow until the number of persons trained to give legal services would be reduced to insure adequate living to the remainder. This analysis assumes that entry barriers into other professions allow for reasonable movement. I am aware that each profession attempts to increase such barriers so that movement laterally across professions is stayed. Notwithstanding limitations on lateral movement, a low relative income would soon reduce the number of new entrants.

The actual price of legal service then is set between the economic value of the service to the client and the cost to the society of having the lawyer not do alternate work. The lawyer prefers the price nearest the top of the scale whereas the rest of society prefers the lower end of the scale. Ultimately, however, the price is set by competition among lawyers. Yet the lawyers have agreed to limit price competition through fixing prices. What is the effect of such price fixing? If the price fixed for a particular legal service is greater than the economic value of the service to the person desiring it, he will not buy it. The popularity of free legal service has shown that the price of many legal services was too high to be economically useful to poor people. Even middle class people will not purchase services that they may desire.¹³ Clearly the effect of price fixing is to limit the legal services taken by the public.

Is there, however, a value to the lawyers in price fixing? Price fixing involves the limitation of price competition. Thus the Committee on Economics of Law Practice asserts that "minimum fee schedules base competition within the profession on skill and the quality of service rather than on the price charged."¹⁴ The non-price competition of which the Committee speaks may be illustrated by the famous sandwich war among the airlines. In that situation the airline rates were fixed for coach fares. The regulation limited the meals served to coach passengers to a sandwich. In order to attract business under such circumstances the airlines made more

¹³ B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* (1970).

¹⁴ COMMITTEE ON ECONOMICS OF LAW PRACTICE, *supra* note 2, at 5.

and more elaborate sandwiches till it became clear that the very meaning of the regulation was being subverted.¹⁵ This non-price competition is not without heavy costs to the public. For example, price regulation by the C.A.B. has led to the near doubling of prices set by a free market. Thus, if we compare the unregulated price of the trip from Los Angeles to San Francisco with the regulated price of a comparable distance under C.A.B. regulations, we find that in 1965 the unregulated jet fare was \$13.50 whereas the regulated fare for both jet and non-jet travel on the regulated route was \$25.65. We also find that the non-regulated companies operating in the California market had safe and efficient airplanes and that they made adequate profits. Thus "cut-throat" competition did not produce either unsafe airplanes nor unprofitable businesses.¹⁶

The benefits of price fixing are illusory and non-price competition can be as costly as price competition without the concomitant benefit to the public. To understand this we must examine what happens when prices are fixed.

If the prices are fixed too low (*i.e.*, below their alternate value or below what people will pay), no services will be performed at that price. Such price fixing results in the shortage of services and black markets. The example of wholesale abandonment of price controlled housing in New York is convincing evidence of the failure of such governmental regulation. Another example of prices fixed too low is the limitation of ten dollars for legal representation before the V.A. The effect of this regulation is to preclude legal representation altogether.¹⁷

Conversely, if prices are fixed too high, less of the service is used. Only persons who value the service over the price fixed will use the service. The remainder of the persons who need the service

¹⁵ "In spite of an austere worded note from the Montreal headquarters of the International Air Transport Association listing the six requirements of a "simple, cold and inexpensive sandwich," victory in the three-week old dispute about the ingredients of an airline sandwich, third class, appears to have gone to the gourmets—and to common sense. Only one of the offending European airlines taken to task by their puritan British and American competitors has actually agreed to modify the collation served to third-class passengers in place of a main meal." *Recipe for a Sandwich*, THE ECONOMIST, May 3, 1958, at 435.

¹⁶ Levine, *Is Regulation Necessary?* *California Air Transportation and National Regulatory Policy*, 74 YALE L.J. 1416 (1965).

¹⁷ 38 U.S.C. § 3404(c) (1959): "The Administrator shall determine and pay fees to . . . attorneys . . . (2) [which] shall not exceed \$10 with respect to any one claim; and (3) [which] shall be deducted from the monetary benefits claimed or allowed."

will either abandon their claims or attempt to have persons outside the profession do the work for them.

Because of price fixing lawyers are faced with a serious problem of competitors attempting to do legal services. Thus because of price fixing, lawyers have abandoned to others, less qualified than they, the preparation of income tax returns.¹⁸ In some states, moreover, lawyers rarely see form contracts for leases or the sale of real estate. The Arizona experience in this matter is particularly instructive. The Arizona Bar went to court against the real estate agents on the question of making real estate form contracts for the sale of houses. The Arizona Supreme Court held that the agents were engaged in unauthorized practice of law. The Bar won its lawsuit; but the real estate agents were not finished. They accused the Bar of bringing this action simply to overcharge the public and in a referendum revised the court decision by more than a two to one vote of the electorate. The reason that the Bar lost was clear: people were convinced that lawyers were charging much more than the particular service was worth.¹⁹

Other effects of the minimum fee are equally clear. If the minimum fees idle some of the lawyers because the fee reduces the demand, it places great pressure on the lawyers to act unethically just to stay alive. A lawyer with little business and no prospect of acquiring more by reducing prices is certainly more likely to act unethically (i.e., cheat his client) than a lawyer who could simply reduce prices to earn a living. The absurdity of the situation is that the emphasis of bar ethics is to call the reduction of prices unethical while possibly enhancing truly unethical conduct by price fixing. A further disadvantage of price fixing is that it may induce more persons to enter the field than can be comfortably supported by the demand. Thus, if the price fixing is successful, then lawyers will earn more than comparable professions. In such a situation persons will be attracted to the legal profession which, because of the limited demand caused by the price fixing, can no longer support new lawyers at such fees. Under these circumstances the result would be either wide-spread price cutting or strong efforts at restricting entry. The medical profession has been able to maintain its strong economic position mostly by restricting entry through the continual increase of the cost of medical education. The lawyers "unfortunately" have not been able to do this: legal education is

¹⁸ The IRS reported that over half of the returns now filed are prepared by agents.

¹⁹ Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A.J. 139 (1963).

comparatively cheap and can at times be sold at a profit. Obviously, by increasing the cost of education through well-staffed clinical programs and small seminars, entry into the legal profession would be substantially effected.

Price fixing comes into existence during periods of slack demand. During times such as the thirties the number of lawyers remained relatively fixed and the demand for the services declined. Competition from underemployed lawyers started to drive down traditional fees, and the organized Bar reacted in an attempt through price fixing to maintain them.²⁰

Presently, however, price fixing works against the interest of the lawyer. The one virtue of price fixing is that it stops some competition for services and thus keeps the price up. This is useful only if demand is inelastic, i.e., if at a lower price there would not be more total revenue. For example, if the price for a simple will were fifty dollars and at that price 1,000 wills were taken, and if when the price was reduced to forty dollars only 1,100 wills were taken, then one could say that the price for wills was inelastic since the total revenue for wills at fifty dollars was \$50,000 and the total revenue for wills at forty dollars was \$44,000. Obversely, if the number of wills taken at forty dollars were 500 more than the total taken at fifty dollars, then one could say that the price for a simple will is elastic since the total revenue at forty dollars would be \$60,000.

Without a full economic study it is unclear whether legal services are generally elastic or inelastic. I would suggest, however, that except for probate the demand is quite elastic. Witness, for example, the great amount of legal business available to OEO Legal Services when the price is nominal. Probate is, of course, an exception because no one will die simply to have his estate probated more cheaply. If then the demand for legal services is basically elastic, it is foolish for the Bar to fix prices, for at lower prices lawyers could do more work and receive more total money. The Bar might argue, however, that although this might be true totally, it would not help the particular lawyer whose time is fully used today at the higher prices. This is true inasmuch as existing lawyers could not do all of the increased work generated by lower prices. On the other hand, if lawyers could hire laymen at non-professional pay to do a substantial amount of the routine business of a law

²⁰ On Sept. 30, 1937, the original Canon was amended by adding the third paragraph of the present Canon relating to minimum fee schedules.

office they could increase their own income and give legal services at lower prices. This cannot be done at fixed prices, however, since the demand at high fixed prices will not permit the economic training of non-professional people. Moreover, if non-professionals were trained in the absence of a greater demand, they could not be used efficiently in specialized roles since the client would not pay even minimum fees when his work was being done by a non-professional.

This discussion assumes, of course, that a considerable amount of the work done by a lawyer could be performed by non-professionals under a lawyer's supervision. Such an arrangement would release lawyers for work that requires legal analysis and legal judgment. In this area a good lawyer need not be afraid of competition since only a limited few in the population are capable of this kind of work. The median lawyer, to be sure, has an IQ of 126.²¹ Hence, one may assume that no one with an IQ of less than 116 can successfully do legal work of a non-routine basis. Only eighteen per cent of the population then could ever be successful lawyers.²²

Formerly, when only five per cent or ten per cent of the population was engaged in work requiring substantial mental ability, this scarcity did not mean much. Today, when better than twenty per cent of all jobs require a college education, it is clear that there is no danger of the legal profession being flooded with persons who do not have an adequately high-paid alternate employment. It is this fact, and not price fixing, that has raised the level of income for lawyers in the last several years. Further evidence that price fixing has been counter productive is that the greatest increase in lawyer income has been from partnerships rather than among solo practitioners. Most income in partnership practice is based on an hourly rate for business clients which is above the minimum whereas most work done by solo practitioners is based on minimum fee schedules for non-business clients. Thus the minimum fee schedules had little to do with this increase in income.

Another reason that price fixing is not needed to support truly professional services is that the client is aware that differences exist in lawyer capabilities and certainly the client wishes to retain the "good lawyer." If a client needs services in the trial field, for example, he wants a lawyer who is likely to win. He is very unlikely

²¹ Harrell & Harrell, *Army General Classification Tests for Civilian Occupations*, 5 Educational and Psychological Measurement 229, 231 (1945).

²² L. CRONBACH, *EDUCATIONAL PSYCHOLOGY* 217 (2d ed. 1963).

to price-shop since the lawyer price for services may in fact be higher if he loses his case. Thus in litigation, at least, the client is much more likely to pay an amount closer to the full economic value of the service rather than the lower amount equal to the alternate value of the lawyer's time. This is also true of tax and business advice. One hires a lawyer in these fields because he is an expert, a professional. When we turn, however, to routine business dealings, default divorces, adoptions, application for administrative permission to do business, form leases, and the like, the client and the lawyers all know that for the most part lawyers when doing such work are fungible and that the work requires only a familiarity with the forms. In such situations the client wishes to receive this service as cheaply as possible. Hence he will shop and if a lawyer will not do the work cheaply enough he may well hire a non-lawyer or do the work himself.

The present system has assured good legal services to persons or businesses whose need for such services exceeds in value the minimum fee schedule. The present system fails, however, to serve the public whenever the need for legal services does not exceed the value of the minimum fee schedule. The view of the Bar is that lawyers are entitled to a professional income and therefore must sell their services at rates that will assure a professional income when fully employed. The Bar fails to consider that such a rate will exclude many persons from needed legal services. No one disagrees that lawyers are "entitled" to a professional income. That they are so entitled should not be at the cost of inadequate service to the public. It is now incumbent upon the Bar either to abandon to others the routine legal services that can be done by trained laymen at below minimum fees or to organize the distribution of such services at prices that the public can and will pay. The Bar must recognize that the threat of competitive legal service comes not only from non-lawyers but from groups such as unions and others who are employing lawyers to serve their members.²³

No reason exists then why lawyers cannot serve the whole public instead of merely the affluent and the poor (the latter by virtue of public subsidy). For the public may be served by using large numbers of reasonably intelligent and educated persons who could be trained as legal assistants. Most routine legal work can be done by such people under the supervision of a lawyer and at a cost of only half to three-quarters of the amount beginning lawyers now receive. The overhead for such persons would not in any way be comparable to that of a lawyer. Some lawyers are already taking

²³ B. CHRISTENSEN, *supra* note 13.

advantage of much legal assistance. In ordinary routine auto litigation, for example, assistants are used to investigate the case, prepare the complaint and interrogatives, and other similar tasks. Within this framework the lawyer becomes a manager. But when he does so, he can receive a substantial—perhaps even higher—professional income and at the same time offer lower rates which thereby increase substantially the legal service available to the public. In addition, the lawyer can be assured that no other persons can successfully invade the legal field. Certainly any client would prefer that a lawyer's office do his tax return, prepare his routine contract, etc., than that a layman do it if the cost were the same. This arrangement would allow the Bar to compete with the group legal services offered by unions and the like. Certainly most persons would prefer independent representation to captured representation if the price were equal.

Clearly a new organization is needed to supply legal services to the public. Only after the abandonment of such artificial devices as price fixing can the use of legal assistants under control of lawyers come into existence. The demand for legal services by an increasingly affluent society can only be tapped if we learn to supply such services cheaply and efficiently. This can happen only if we abandon fixed fee systems and supply all the existing demand. Hopefully the Bar will reconsider its approach and abandon minimum bar fees to foster, instead, the training of legal assistants and the delivery of inexpensive legal services.